

1                                   **TAX OF SEXUALLY EXPLICIT MATERIALS**

2   2003 GENERAL SESSION

3   STATE OF UTAH

4                                   **Sponsor: Duane E. Bourdeaux**

5 **This act modifies the Revenue and Taxation Code to impose a tax on a sexually explicit**  
6 **business and an escort service. The act enacts provisions for the administration of the tax**  
7 **imposed by the act. The act dedicates the tax revenue generated by the tax imposed by**  
8 **the act to a restricted special revenue fund for prevention and treatment programs for**  
9 **sex offenders. The act takes effect on July 1, 2003.**

10 This act affects sections of Utah Code Annotated 1953 as follows:

11 ENACTS:

12           **59-25-101**, Utah Code Annotated 1953

13           **59-25-102**, Utah Code Annotated 1953

14           **59-25-103**, Utah Code Annotated 1953

15           **59-25-104**, Utah Code Annotated 1953

16           **59-25-105**, Utah Code Annotated 1953

17           **59-25-106**, Utah Code Annotated 1953

18           **59-25-107**, Utah Code Annotated 1953

19           **59-25-108**, Utah Code Annotated 1953

20 *Be it enacted by the Legislature of the state of Utah:*

21           Section 1. Section **59-25-101** is enacted to read:

22                                   **CHAPTER 25. SEXUALLY EXPLICIT BUSINESS AND ESCORT**

23   **SERVICE TAX ACT**

24           **59-25-101. Title.**

25           This chapter is known as the "Sexually Explicit Business and Escort Service Tax Act."

26           Section 2. Section **59-25-102** is enacted to read:

27           **59-25-102. Definitions.**



28           (1) "Escort" means any individual who is available to the public for the purpose of  
29 accompanying another individual for:

- 30           (a) companionship; and
- 31           (b) (i) a salary;
- 32           (ii) a fee;
- 33           (iii) a commission;
- 34           (iv) hire;
- 35           (v) profit; or
- 36           (vi) any other consideration.

37           (2) "Escort service" means any person who furnishes or arranges for an escort to  
38 accompany another individual for:

- 39           (a) companionship; and
- 40           (b) (i) a salary;
- 41           (ii) a fee;
- 42           (iii) a commission;
- 43           (iv) hire;
- 44           (v) profit; or
- 45           (vi) any other consideration.

46           (3) "Nude or partially denuded individual" means an individual with any of the  
47 following less than completely and opaquely covered:

- 48           (a) genitals;
- 49           (b) the pubic region;
- 50           (c) a buttock; or
- 51           (d) a female breast below a point immediately above the top of the areola.

52           (4) "Sexually explicit business" means a business where any nude or partially denuded  
53 individual, regardless of whether the nude or partially denuded individual is an employee of the  
54 sexually explicit business or an independent contractor, performs any service for:

- 55           (a) a salary;
- 56           (b) a fee;
- 57           (c) a commission;
- 58           (d) hire;

59 (e) profit; or

60 (f) any other consideration.

61 Section 3. Section **59-25-103** is enacted to read:

62 **59-25-103. Tax imposed on a sexually explicit business -- Tax imposed on an**  
63 **escort service.**

64 (1) A tax is imposed on a sexually explicit business equal to 10% of amounts paid or  
65 charged by the sexually explicit business for the following transactions:

66 (a) an admission fee;

67 (b) a user fee;

68 (c) a retail sale of tangible personal property made within the state;

69 (d) a sale of:

70 (i) food and food ingredients; or

71 (ii) prepared food;

72 (e) a sale of a beverage; and

73 (f) amounts paid or charged for any service.

74 (2) (a) Except as provided in Subsection (2)(b), a tax is imposed on an escort service  
75 equal to 10% of amounts paid or charged by the escort service for any transaction that involves  
76 providing an escort to another individual.

77 (b) Notwithstanding Subsection (2)(a), the tax imposed in Subsection (2)(a) does not  
78 apply to a transaction that is subject to the tax imposed in Subsection (1).

79 (3) The tax imposed by this section:

80 (a) does not apply to any sales and use tax collected or paid under Chapter 12, Sales  
81 and Use Tax Act; and

82 (b) does not affect the amount that may be collected or paid under Chapter 12, Sales  
83 and Use Tax Act.

83a **h (4) THE COMMISSION SHALL ADMINISTER THIS CHAPTER IN ACCORDANCE WITH**  
83b **CHAPTER 12, PART 1, TAX COLLECTION. h**

84 Section 4. Section **59-25-104** is enacted to read:

85 **59-25-104. Payment of tax.**

86 (1) Subject to Subsection (2), a sexually explicit business or escort service subject to  
87 the tax imposed by this chapter shall file a return with the commission and pay the tax reflected  
88 in the return to the commission:

89 (a) quarterly on or before the last day of the month next succeeding each calendar

90 quarterly period if:

91 (i) the sexually explicit business or escort service is required to file a quarterly sales  
92 and use tax return with the commission under Section 59-12-107; or

93 (ii) the sexually explicit business or escort service is not required to file a sales and use  
94 tax return with the commission under Chapter 12, Sales and Use Tax Act; or

95 (b) monthly on or before the last day of the month next succeeding each calendar  
96 month if the sexually explicit business is required to file a monthly sales and use tax return  
97 with the commission under Section 59-12-108.

98 (2) The tax paid by a sexually explicit business or an escort service under this chapter  
99 may not be included as part of the calculation for determining whether the sexually explicit  
100 business or escort service is:

101 (a) required to file a quarterly sales and use tax return with the commission under  
102 Section 59-12-107; or

103 (b) required to file a monthly sales and use tax return with the commission under  
104 Section 59-12-108.

105 Section 5. Section **59-25-105** is enacted to read:

106 **59-25-105. Sexually explicit business and escort service fund.**

107 (1) There is created a restricted special revenue fund called the "Sexually Explicit  
108 Business and Escort Service Fund."

109 (2) (a) The fund consists of all amounts collected by the commission under this  
110 chapter.

111 (b) The commission shall deposit the funds in an account with the state treasurer.

112 (c) The monies in the fund shall be invested by the state treasurer pursuant to Title 51,  
113 Chapter 7, State Money Management Act, except that all interest or other earnings derived  
114 from the fund monies shall be deposited in the fund.

115 (3) The monies in the fund may not be used for any administrative expenses normally  
116 provided for by legislative appropriation.

117 (4) (a) Fund monies shall be used as provided in this Subsection (4).

118 (b) The Department of Corrections shall use 65% of the monies in the fund to  
119 implement, through a competitive bid process, treatment programs for adults who have been  
120 convicted of an offense under Title 76, Chapter 5, Part 4, Sexual Offenses.

121 (c) The Department of Corrections shall use 15% of the monies in the fund to  
122 implement, through a competitive bid process, treatment programs for juveniles who have been  
123 convicted of an offense under Title 76, Chapter 5, Part 4, Sexual Offenses.

124 (d) (i) The Department of Corrections shall use 15% of the monies in the fund to  
125 implement, through a competitive bid process, preventive treatment programs designed to  
126 identify and intervene with habits or actions that may contribute to an offense under Title 76,  
127 Chapter 5, Part 4, Sexual Offenses.

128 (ii) For purposes of this Subsection (4)(d), the Department of Corrections shall:

129 (A) work in conjunction with the attorney general; and

130 (B) identify types of pornography, obscenity, and other materials that may contribute to  
131 an offense under Title 76, Chapter 5, Part 4, Sexual Offenses.

132 (e) The attorney general shall use 5% of the monies in the fund to maintain the  
133 Obscenity and Pornography Complaints Ombudsman created in Section 67-5-18.

134 Section 6. Section **59-25-106** is enacted to read:

135 **59-25-106. Records.**

136 (1) An owner or operator of a sexually explicit business or escort service shall maintain  
137 records, statements, books, or accounts necessary to determine the amount of tax for which the  
138 owner or operator is liable to pay under this chapter.

139 (2) The commission may require an owner or operator of a sexually explicit business or  
140 escort service, by notice served on the person, to make or keep the records, statements, books,  
141 or accounts the commission considers sufficient to show the amount of tax for which the owner  
142 or operator is liable to pay under this chapter.

143 (3) After notice by the commission, the owner or operator of a sexually explicit  
144 business or escort service shall open the records, statements, books, or accounts specified in  
145 Subsection (2) for examination by the commission or an authorized agent of the commission.

146 Section 7. Section **59-25-107** is enacted to read:

147 **59-25-107. Action for collection of tax -- Action for refund or credit of tax.**

148 (1) (a) Except as provided in Subsections (2) through (5), the commission shall assess  
149 a tax under this chapter within three years after a sexually explicit business or escort service  
150 subject to the tax imposed by this chapter files a return.

151 (b) Except as provided in Subsections (2) through (5), if the commission does not

152 assess a tax under this chapter within the three-year period provided in Subsection (1)(a), the  
153 commission may not commence a proceeding to collect the tax.

154 (2) The commission may assess a tax at any time if a sexually explicit business or  
155 escort service subject to the tax imposed by this chapter:

156 (a) files a false or fraudulent return with intent to evade; or

157 (b) does not file a return.

158 (3) The commission may extend the period to make an assessment or to commence a  
159 proceeding to collect the tax under this chapter if:

160 (a) the three-year period under Subsection (1) has not expired; and

161 (b) the commission and the sexually explicit business or escort service subject to the  
162 tax imposed by this chapter sign a written agreement:

163 (i) authorizing the extension; and

164 (ii) providing for the length of the extension.

165 (4) If the commission delays an audit at the request of a sexually explicit business or  
166 escort service subject to the tax imposed by this chapter, the commission may make an  
167 assessment as provided in Subsection (5) if:

168 (a) the sexually explicit business or escort service subject to the tax imposed by this  
169 chapter subsequently refuses to agree to an extension request by the commission; and

170 (b) the three-year period under Subsection (1) expires before the commission  
171 completes the audit.

172 (5) An assessment under Subsection (4) shall be:

173 (a) for the time period for which the commission could not make an assessment  
174 because of the expiration of the three-year period; and

175 (b) in an amount equal to the difference between:

176 (i) the commission's estimate of the amount of tax the sexually explicit business or  
177 escort service subject to the tax imposed by this chapter would have been assessed for the time  
178 period described in Subsection (5)(a); and

179 (ii) the amount of tax the sexually explicit business or escort service subject to the tax  
180 imposed by this chapter actually paid for the time period described in Subsection (5)(a).

181 (6) (a) Except as provided in Subsection (6)(b), the commission may not make a credit  
182 or refund unless the sexually explicit business or escort service subject to the tax imposed by

183 this chapter files a claim with the commission within three years of the date of overpayment.

184 (b) Notwithstanding Subsection (6)(a), the commission shall extend the period for a  
 185 taxpayer to file a claim under Subsection (6)(a) if:

186 (i) the three-year period under Subsection (6)(a) has not expired; and

187 (ii) the commission and the sexually explicit business or escort service subject to the  
 188 tax imposed by this chapter sign a written agreement:

189 (A) authorizing the extension; and

190 (B) providing for the length of the extension.

191 Section 8. Section **59-25-108** is enacted to read:

192 **59-25-108. Penalties and interest.**

193 An owner or operator of a sexually explicit business or escort service that fails to  
 194 comply with this chapter is subject to:

195 (1) penalties provided in Section 59-1-401; and

196 (2) interest provided in Section 59-1-402.

197 Section 9. **Effective date.**

198 This act takes effect on July 1, 2003.

### **Legislative Review Note**

**as of 2-13-03 11:45 AM**

This legislation imposes a tax on a sexually explicit business or an escort service. The legislation might be challenged on grounds that it violates the Equal Protection Clause or the First Amendment of the United States Constitution. The United States Supreme Court has not decided a case addressing taxation of sexually explicit materials, but has decided cases involving a tax on other activities protected by the First Amendment. The Supreme Court has held that in those situations where a tax implicates both First Amendment and Equal Protection principles, courts should analyze the case primarily under the First Amendment.

If this legislation were challenged, a court might first determine whether the conduct taxed by this legislation, sexually explicit businesses and escort services, constitutes obscenity. If the conduct constitutes obscenity, it is not protected by the First Amendment. If a court were to conclude that the conduct taxed by this legislation is not obscene, and thus protected by the First Amendment, the court could uphold the legislation if the court determined that the tax is necessary to serve a compelling state interest, and that the tax is narrowly drawn to achieve that end.

**Office of Legislative Research and General Counsel**

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**Fiscal Note**  
**Bill Number HB0300**

**Tax of Sexually Explicit Materials**

21-Feb-03

3:37 PM

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**State Impact**

Passage of this bill could increase restricted funds by \$510,000 in FY 2004 and by \$1,020,600 in FY 2005.

	<u>FY 04 Approp.</u>	<u>FY 05 Approp.</u>	<u>FY 04 Revenue</u>	<u>FY 05 Revenue</u>
Restricted Funds	\$0	\$0	\$510,000	\$1,020,600
<b>TOTAL</b>	<b>\$0</b>	<b>\$0</b>	<b>\$510,000</b>	<b>\$1,020,600</b>

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**Individual and Business Impact**

Individuals using the services identified in the bill will pay a 10 percent tax on services.

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**Office of the Legislative Fiscal Analyst**